No. 75-1488

In the Supreme Court of the United States

OCTOBER TERM, 1975

Supreme Court, U. S.
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ROBERT HAMPTON, ET AL., COMMISSIONERS OF THE UNITED STATES CIVIL SERVICE COMMISSION,
APPELLANTS

v.

JOAN MYERS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The district court's orders of September 18, 1973 (App. A, *infra*, pp. 1a-7a), the district court's order of August 15, 1975 (App. B, *infra*, pp. 8a-18a), and the district court's final order of November 20, 1975 (App. C, *infra*, pp. 19a-21a) are unreported.

JURISDICTION

The final order of the district court, holding unconstitutional certain portions of 5 U.S.C. 8341 and ordering the Commissioners of the Civil Service Commission to pay benefits to plaintiff, was entered on November 20, 1975 (App. C, *infra*, pp. 19a-21a). A notice of appeal to this Court (App. D, *infra*, p. 22a) was filed on December 17, 1975. On February 6, 1976, Mr. Justice Stewart extended the time for docketing the appeal to and including March 16, 1976, and on March 8, 1976, he further extended the time to and including April 15, 1976. The Court's jurisdiction is conferred by 28 U.S.C. 1252.[1]

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[1] The complaint initially named only the Civil Service Commission as defendant; it sought relief against the Commission's enforcement of 5 U.S.C. 8341 to the extent that that statute provides different treatment for legitimate and illegitimate children of deceased federal employees. The government inadvertently failed to file an answer. Subsequently, on plaintiff's motion for a default judgment under Rule 55(e), Fed. R. Civ. P., the district court entered an "opinion and order" declaring the challenged portion of the statute unconstitutional and enjoining the Civil Service Commission generally from "treating * * * illegitimate children seeking survivors' benefits differently from legitimate children" (App. A, *infra*, pp. 1a-5a). The court also issued an "order" determining that appellee individually was entitled to relief (App. A, *infra*, pp. 6a-7a).

The government appealed to the court of appeals from those orders, contending that the district court had lacked jurisdiction because the Civil Service Commission could not be sued *eo nomine* (*Blackmar* v. *Guerre*, 342 U.S. 512) and a three-judge court was required to hear requests for injunctive relief against the enforcement of a federal statute (28 U.S.C. 2282); the government at the same time moved in the district court to vacate the judgment. The government requested an extension of time in which to file its brief in the court of appeals, to permit the district court to rule on the motion to vacate; the court of appeals denied the extension on the ground that the district court no longer had jurisdiction to vacate the judgment once notice of appeal had been filed. Since the government's brief was not filed within the unextended briefing time, the court of appeals dismissed the appeal. 493 F.2d 1246.

The government then renewed in the district court its motion to vacate; the plaintiff moved to "correct a misnomer" by substituting the individual Civil Service Commissioners (the properly suable parties) for the Civil Service Commission *eo nomine*. The district court granted the plaintiff's motion and denied the government's motion (App. B, *infra*, pp. 8a-18a).

The government then called to the district court's attention that none of the orders in the case had been accompanied by an appealable separate judgment, as required by Rule 58, Fed. R. Civ. P. See *United States* v. *Indrelunas*, 411 U.S. 216. Accordingly, on November 20, 1975, the district court entered a separate judgment, awarding the relief that had been held to be appropriate in the earlier orders (with the exception of injunctive relief, which, with appellee's apparent acquiescence, was omitted) (App. C, *infra*, pp. 19a-21a).

QUESTION PRESENTED

Whether 5 U.S.C. 8341 violates the Due Process Clause of the Fifth Amendment insofar as it conditions the receipt of annuity benefits by an illegitimate child of a deceased federal employee upon a showing that the child had lived with the employee in a "regular parent-child relationship."

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The pertinent provisions of the Fifth Amendment and 5 U.S.C. 8341 are set forth in Appendix E, *infra*, pp. 23a-24a.

STATEMENT

1. This is an appeal from a decision of a single-judge district court holding unconstitutional a provision of the Civil Service retirement statute, 5 U.S.C. 8341(a)(3)(A)(ii). The statute provides annuities for the widow and surviving children of a deceased federal employee who at the time of his death was covered by the Civil Service retirement plan (5 U.S.C. 8331(1)) and had completed five years of government service.

The surviving child's annuity is payable to an unmarried child under the age of 18 (or under the age of 22 in the case of a full-time student, and without regard to age in the case of a child who is incapable of supporting himself because of a disability that was incurred before he reached the age of 18), including (5 U.S.C. 8341(a)(3)(A)):

> (i) an adopted child, and (ii) a stepchild or recognized natural child who lived with the employee or Member in a regular parent-child relationship * * *

Under this statute, a stepchild or acknowledged illegitimate child of a deceased federal employee must show, as a condition of eligibility for an annuity, that he or she had lived with the employee in a regular parent-child relationship; legitimate or adopted children of the employee need not make such showings. Federal Personnel Manual, chapter 831-1, subchapter S17-2(e) (App. E, *infra*, pp. 24a-25a).

2. Appellee is the illegitimate daughter of a deceased employee of the United States Post Office who,

at the time of his death, was covered by the Civil Service retirement plan and had completed five years of government service. Appellee's mother filed on her behalf a claim for a survivor's annuity. In response to the application, the Civil Service Commission requested that appellee file supporting affidavits establishing that appellee had lived in a regular parent-child relationship with the deceased. Because the Commission did not receive the requested affidavits, it denied the claimed annuity. Appellee did not seek administrative review.

Appellee then commenced this suit in the United States District Court for the Southern District of Ohio, contending that the Civil Service retirement statute, 5 U.S.C. 8341(a)(3)(A)(ii), violates the Due Process Clause of the Fifth Amendment insofar as it requires illegitimate children to establish that they lived in a parent-child relationship with a deceased federal employee without requiring a similar showing in the case of a legitimate child. The district court declared the statute unconstitutional and ordered the payment of annuity benefits to appellee (App. C, *infra*, pp. 20a-21a).

THE QUESTION IS SUBSTANTIAL

This appeal presents an important question concerning the award of annuities to surviving minor children of deceased federal employees. In holding unconstitutional certain portions of the Civil Service retirement statute, 5 U.S.C. 8341(a)(3)(A)(ii), the district court misconceived the purpose and effect of

that statute and misapplied prior decisions of this Court regarding statutes involving illegitimate children. Resolution of this question is necessary to clarify the responsibility of the Civil Service Commission in administering the program of survivors' annuities.[2]

1. As we show at pp. 27-30 of our brief in *Norton* v. *Mathews*, No. 74-6212, argued January 13, 1976,[3] the validity of a statutory classification that distinguishes between legitimate and illegitimate children for the purpose of awarding survivor's benefits does not turn upon whether the classification furthers a "compelling governmental interest." In a case such as this, due process requires, at most, a showing that Congress could have reasonably believed that the statutory classification would further an actual and permissible legislative objective. Cf. *Weinberger* v. *Wiesenfeld*, 420 U.S. 636. See also, *e.g.*, *Jimenez* v. *Weinberger*, 417 U.S. 628; *Weber* v. *Aetna Cas-*

[2] The statute at issue in this case is similar to Sections 202 (d) (3) and 216(h) (3) (C) (ii) of the Social Security Act, 42 U.S.C. 402(d) (3) and 416(h) (3) (C) (ii), which condition certain illegitimate children's receipt of surviving child's insurance benefits upon a showing that a deceased male wage-earner was their father and was, at the time of his death, living with them or contributing to their support. The constitutionality of these provisions is now before this Court in *Norton* v. *Mathews*, No. 74-6212, and *Mathews* v. *Lucas*, No. 75-88, both argued January 13, 1976. It may therefore be appropriate to hold this appeal pending disposition of *Norton* and *Lucas*.

[3] A copy of our brief in *Norton* is being furnished to appellee's counsel.

ualty & Surety Co., 406 U.S. 164; *Labine* v. *Vincent*, 401 U.S. 532. The statutory classification challenged here passes that test.

The underlying purpose of the child's survivor annuity program is to provide support only for the *dependent* children of deceased federal employees.[4]

[4] The legislative history makes this purpose explicit. Under the statute as originally enacted, support or dependency was an explicit condition on eligibility for stepchildren, adopted children, or children over 18 years of age. The term "child" was defined as "an unmarried child, including a dependent stepchild or an adopted child, under the age of eighteen years, or such unmarried child who because of physical or mental disability is incapable of self-support." Pub. L. 426, 62 Stat. 48, 55, 5 U.S.C. (Supp. II, 1946 ed.) 724(d) (2).

Congress subsequently amended the statute expressly to include certain illegitimate children. The term "child" was redefined as: "an unmarried child, including (1) an adopted child, and (2) a stepchild or recognized natural child who received more than one-half his support from and lived with the Member or employee in a regular parent-child relationship, under the age of eighteen years, or such unmarried child regardless of age who because of physical or mental disability incurred before age eighteen is incapable of self-support." Pub. L. 854, 70 Stat. 736, 744, 5 U.S.C. (1958 ed.) 2251(j). The "more than one-half of support" requirement applied not only to stepchildren and recognized illegitimate children, but also to legitimate children if the deceased federal employee was survived by a spouse. 70 Stat. 754, 5 U.S.C. (1958 ed.) 2260(d). The intent of these amendments was to provide support for all "dependent" children. See S. Rep. No. 2642, 84th Cong., 2d Sess. 11-12 (1956); H.R. Rep. No. 2854, 84th Cong., 2d Sess. 17-18 (1956).

The "more than one-half of support" requirement subsequently was repealed because it only rarely resulted in benefits when the deceased federal employee was the mother of the surviving children, notwithstanding that her support may have been substantial. Pub. L. 89-504, 80 Stat. 288, 300, 301-

The purpose of requiring an illegitimate child to prove that he or she lived in a regular parent-child relationship with the deceased federal employee is to restrict the payment of benefits to those children who may be reasonably presumed to have been dependent. This Court consistently has recognized the "lurking problems with respect to proof" of claims asserted by illegitimate children to benefits earned by their putative parents (*Gomez* v. *Perez*, 409 U.S. 535, 538) and has indicated that a requirement of dependency is an appropriate limitation on such claims. *Weber* v. *Aetna Casualty & Surety Co.*, *supra*, 406 U.S. at 174-175, n. 12.

The statutory classification is not mathematically precise. Some illegitimate children living with their parents in a parent-child relationship may not be economically dependent; others who do not live with their parents may be dependent. But it was broadly reasonable for Congress to assume that a substantial majority of the illegitimate minor children who live with their parents are economically dependent, and that a substantial majority of those who do not, are not. Due process does not require statutory classifica-

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302, 5 U.S.C. (Supp. III, 1964 ed.) 8341. The "regular parent-child relationship" requirement for stepchildren and illegitimates was retained. See "Federal Statutory Salary Systems," H.R. Doc. No. 402, 89th Cong., 2d Sess. 41 (1966).

Thus while the specific mechanism for providing annuities for surviving dependent children has varied, the central purpose has remained: to "cushion the effects of loss of income through death" (*ibid.*).

tions to be drawn with mathematical precision. *Weinberger* v. *Salfi*, 422 U.S. 749, 780-785.[5]

Congress understandably sought to avoid the expensive process of case-by-case determinations of dependency. The legislative purpose is therefore the modest one of separating the class of children as to which it is reasonable to assume dependency[6] from the class as to which it is not reasonable, and the statutory classification challenged here carries out that purpose.

2. The issue presented here is also pending in *Gerald E. Gentry* v. *United States*, No. 312-74 (Ct. Cl.), and *Gloria Proctor* v. *United States*, No. 75-0436 (D.D.C.). We are further informed by the Civil Service Commission that the question of illegitimates' eligibility for annuity benefits frequently arises at the administrative level.

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[5] Indeed, the classification at issue in *Salfi*, denying benefits to surviving widows who married the deceased wage-earner less than nine months prior to death, was at least equally subject to the criticism offered by the district court here: some women who marry wage-earners less than nine months before the wage-earner's death are not motivated by a desire to receive survivor's benefits, and some who marry more than nine months before death are so motivated; nevertheless, that statutory classification was sustained as reasonably related to the desire to avoid payment of survivor's benefits to widows whose marriages were so motivated.

[6] Appellee does not appear to dispute the reasonableness of the assumption that legitimate or adopted minor children are ordinarily dependent upon their parents. That assumption is amply justified by human experience.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted.

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APRIL 1976.

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. 8682

[Filed Sep. 18, 3:17 p.m., '73]

INFANT JOAN MYERS, through her mother and next friend Evelyn M. Myers, PLAINTIFF

—*vs.*—

UNITED STATES CIVIL SERVICE COMMISSION, DEFENDANT

OPINION AND ORDER

This suit was brought under 28 U.S.C.A. Section 1331 by the illegitimate, adjudicated 11-year-old daughter of a deceased postal employee through her mother and next friend challenging the constitutionality of that section of the Civil Service Retirement Act which imposes upon illegitimate [1] children a further test or condition of eligibility not imposed on legitimate claimants. The complaint sought declaratory and injunctive relief under 28 U.S.C.A. Sections 2201-02 and 28 U.S.C.A. Sections 2282, 2284 against the operation of 5 U.S.C.A. Section 8341(a)(4)(A)(ii) which requires such illegitimate surviving claimants to have "lived with the employee . . . in a regu-

[1] and recognized or adjudicated.

lar parent-child relationship." The plaintiff contends that the imposition of such an additional condition of eligibility upon such illegitimate children denies that rudimentary standard of equal protection implicit in the due process clause of the Fifth Amendment.

To this court's astonishment and dismay counsel for the government elected neither to answer nor otherwise responsively to plead. The case has resultingly come before this court on a motion for a default judgment under Rule 55(e) of the Federal Rules of Civil Procedure. That rule provides that: "No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes his claim or right by evidence satisfactory to the court."

The scheduled presentation of evidence was rendered unnecessary by government counsel's conceding all factual allegations just as the first witness was about to be sworn. The court was thus confronted solely with legal issues as to which it now sets out with its competence to judge and its judgment on the merits.

In view of the clear thrust of recent federal decisions analyzed below, this court will accept the invitation extended to a single district judge in *Bailey* v. *Patterson*, 369 U.S. 31 (1962) and recently accepted by the chief judge of this district in *Doe* v. *Brown*, (#73-46, S.D.OH E.D., Kinneary) to declare a statute unconstitutional where any defense would be clearly frivolous. As Judge Friendly observed, "Congress could not have intended to require three judges

to be assembled when decision could not possibly go in any way save one." *Utica Mut. Ins. Co.* v. *Vincent*, 375 F2d 129, 131 n.1, cert. denied 389 U.S. 389 (1967), quoted in Charles Alan Wright, *Law of Federal Courts* 192 (1970).

In the past half dozen years there have been eight Supreme Court decisions touching on illegitimates' claims to equal protection. Two of those cases were not decided in favor of the illegitimate: *Linda R. S.* v. *Richard D.*, 410 U.S. ——, 35 L.Ed. 2d 836, 93 S.Ct. 1146, 41 U.S.L.W. 4371 (1973) and *Labine* v. *Vincent*, 401 U.S. 532 (1971). The first case was an affirmance of a dismissal for want of standing and really intimates nothing as to the merits of the instant case. The *Labine* case simply reiterated the broad discretion which a state has always enjoyed in formulating its rules of intestate succession. When closely read, neither decision governs the case at bar.

The more germane cases are *Levy* v. *Louisiana*, 391 U.S. 68 (1968), *Glona* v. *American Guaranty and Liability Insurance Co.*, 391 U.S. 73 (1968), *Weber* v. *Aetna Casualty and Surety Co.*, 406 U.S. 164 (1972), *Gomez* v. *Perez*, 409 U.S. 535 (1972), *Richardson* v. *Davis*, 409 U.S. 678 (1972), and *Richardson* v. *Griffin*, 409 U.S. 1069 (1972).

In *Levy* and again in *Gomez* the Supreme Court held that a state may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally. *Weber* v. *Aetna Casualty*, *Richardson* v. *Davis* and *Richardson* v. *Griffin* are even more in point in their teach-

ing that statutory compensation schemes may not, in awarding benefits, prefer one class of dependent children over another according to the status of their birth.

Our reading of the Supreme Court's teaching is reinforced by the decisions of other federal courts in cases similar to this one. In *Miller* v. *Laird*, 349 F. Supp. 1034 (D.C.D.C. 1972) a three judge court held that a provision of the Dependents' Medical Care Act denying medical care to dependent illegitimate children of military personnel denied due process to such children whose paternity had been judicially determined. In *Beaty* v. *Weinberger*, 478 F.2d 300 (5th Cir. 1973) a section of the Social Security Act which denied benefits to those illegitimate children who were born after their father's disability was declared unconstitutional. In *Severance* v. *Weinberger*, 42 L.W. 2065 (D.C.D.C. July 2, 1973) the court invalidated a section of the Social Security Act which required illegitimate children, as a prerequisite to eligibility to benefits, to be acknowledged or supported by their father at least one year prior to the date their father became entitled to old age benefits.

In light of the authorities set out above,[2] this court

[2] The recent Supreme Court determination of the basic question in the Workmens Compensation field is in the same context exactly from every aspect of import. Both involve inducements to employment and/or continuance thereof both involve "non-contributory" in/money qua money but inchoate and accrual via labor both would be classified by some as "fringe", both deal with and are grounded on paternal duty and desire to support and both deal with the problem "absens uxor." The end in each is the devolvement of justly earned to defendant (child)—there just is no relevance to the end to be served and the question of "legit vel non"—that is particularly true in the "adjudicated" or "recognized" field.

declares that 5 U.S.C.A. Section 8341(a)(4)(A)(ii) violates the rudimentary standard of equal protection implicit in the due process clause of the Fifth Amendment by requiring that such recognized or adjudicated illegitimate children have "lived with the employee . . . in a regular parent-child relationship," while imposing no such requirement on legitimate children. The United States Civil Service Commission is thus enjoined from treating such illegitimate children seeking survivors' benefits differently from legitimate children seeking such benefits.

/s/ Timothy S. Hogan
United States District Judge

Typed as "Proposed" by counsel for Pl. Long Hand is added by Court [this notation and the two footnotes are written in long hand in the original copy].

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. 8682

[Filed Sep. 18, 3:17 p.m., '73]

Infant JOAN MYERS, through her mother and next friend EVELYN M. MYERS, PLAINTIFF

-vs-

UNITED STATES CIVIL SERVICE COMMISSION, DEFENDANT

ORDER

It seems provident in this case to enter separate judgments governing the relief for the named plaintiff and governing the constitutionality of 5 U.S.C.A. Section 8341(a)(4)(A)(ii). Although plaintiff's attack on the constitutionality of the statute would ordinarily be within the special domain of a three judge federal district court under 28 U.S.C.A. Sections 2282, 2284, two exceptions carved out by the Supreme Court give a single judge competence to grant the types of relief sought in this case. *Flemming* v. *Nestor*, 363 U.S. 603 (1960) and *Bailey* v. *Patterson*, 369 U.S. 31 (1962).

Flemming v. *Nestor* held the statutory three judge court to be unnecessary where the relief sought would result only in the payment of benefits to an individual. Under the authority of that case defendant United States Civil Service Commission is hereby ordered to treat the application of the illegitimate

claimant in this case as though she were, in fact, legitimate for reasons spelled out in the more extensive accompanying judgment on the statute's unconstitutionality.

/s/ Timothy S. Hogan
United States District
Judge

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil Action No. 8682

[Filed Aug. 15, 1975]

INFANT JOAN MYERS, through her mother and next friend Evelyn M. Myers, PLAINTIFF

v.

UNITED STATES CIVIL SERVICE COMMISSION, DEFENDANT

ORDER GRANTING PLAINTIFF'S MOTION FOR LEAVE TO CORRECT MISNOMER AND DENYING DEFENDANT'S MOTION TO VACATE DEFAULT JUDGMENT

Before the Court now is a motion by the plaintiff concerning two default judgment orders entered by the Court in this case on September 18, 1973 and a motion by the defendant to vacate those default judgment orders. One of the orders directed the defendant United States Civil Service Commission to treat the application for Civil Service benefits of the plaintiff illegitimate child as though she were legitimate. The other order declared 5 U.S.C. § 8341(a)(4)(A)(ii) unconstitutional as violative of the equal protection standard implicit in the due process clause of the Fifth Amendment and enjoined the defendant

from treating dependent illegitimate children seeking survivor's benefits differently from legitimate children seeking such benefits.

The defendant appealed the orders granting default judgment to the United States Court of Appeals for the Sixth Circuit. Later, the defendant moved this Court to vacate the default judgment or for a stay pending appeal. These motions were denied. Plaintiff then moved to dismiss defendant's appeal in the Court of Appeals on the ground that defendant failed to file its brief within the prescribed time. This motion was granted and defendant's appeal was dismissed.

The defendant then again moved to vacate the default judgment on June 3, 1974. However, attorneys for plaintiff and defendant agreed to attempt to settle the case as an alternative to arguing defendant's motion to vacate. The parties have been unsuccessful in their attempts at settlement and plaintiff has now moved this Court for leave to correct a misnomer of the defendant. For the reasons stated below, plaintiff's motion will be granted and defendant's motion to vacate will be denied.

I. MOTION TO CORRECT MISNOMER

Plaintiff has moved this Court for leave to correct a misnomer of the defendant in the default judgment orders pursuant to Rule 60(a) of the Federal Rules of Civil Procedure. Plaintiff asserts that the defendant should not have been identified as the United

States Civil Service Commission, but rather as Robert Hampton, Jayne B. Spain, and L. J. Andolsek, Civil Service Commissioners.

Defendant has opposed this motion essentially on three grounds: (1) Naming the wrong defendant in a suit is not a clerical mistake and is therefore not the type of error which may be corrected under Rule 60(a); (2) Rule 15 is no authority for amending judgments; and (3) As demonstrated by the case of *Blackmar* v. *Guerre*, 342 U.S. 512 (1952), the United States Civil Service Commission is not a suable entity, thus the Court lacked jurisdiction over the defendant and such lack of jurisdiction is not an amendable defect governed either by Rule 60 (a) or 15 (c).

Rule 60 (a) provides in part:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

Defendant claims that naming the wrong defendant in a suit is not a clerical mistake and is therefore not the type of error which can be amended by Rule 60 (a). Defendant, however, cites no authority for this proposition.

In *Fluoro Elec. Corp.* v. *Branford Associates*, 489 F.2d 320 (2d Cir. 1973) the court held that since it was obvious to the plaintiff, to the trial judge, and to the jury that only one group of men had contracted

with the plaintiff and plaintiff had sought to hold that group of men liable regardless of the legal status of the group, the lower court had not erred in granting plaintiff's motion under Rule 60(a) for correction of the misnamed defendant.

In *Anderson* v. *Brady*, 6 F.R.D. 587 (E.D. Ky. 1947) Judge Swinford allowed an amendment under Rule 60(a) correcting the name of an executor from "Commercial Bank" to "Commercial Deposit Bank" after a default judgment had been entered. Judge Swinford's reasons were:

> No one was misled or deceived. The proper party was actually served with process. 6 F.R.D. at 587.

The so-called "misnomer" rule was devised to give relief to parties who had misnamed a person in a legal proceeding or instrument. Rule 60(a) can properly be used to correct misnomers or misdescriptions of a party. 3 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 1324 at 399-400 (Wright ed. 1958). The rule applies to those situations in which the plaintiff has actually sued or served the party he intended to sue but merely mistakenly used the wrong name of the defendant in the caption of the complaint. *People of the Living God* v. *Star Towing Co.*, 289 F.Supp. 635, 641 (E.D. La. 1968). The test applied is whether it is reasonable for the court to conclude that the plaintiff had in mind the proper entity or person, merely made a mistake as to the name, and actually served the entity or person intended, or whether the plaintiff actually

meant to serve and sue a different person. *Munetz* v. *Eaton Yale and Towne, Inc.*, 57 F.R.D. 476 (E.D. Pa. 1973).

Rule 15(c) provides:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted related back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.
>
> The delivery or mailing of process to the United States Attorney, or his designee, to the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

Thus, if plaintiff had amended his complaint to name the individual Commissioners as defendants, Rule 15(c) directs that service would have been proper if delivered or mailed to the United States

Attorney, Attorney General of the United States, or an agency or officer who would have been a proper defendant if named. Service was made in the present case to the United States Attorney, the Attorney General of the United States, and the United States Civil Service Commission.

This Court cannot see how defendants were misled or deceived. As officers of an agency of the United States, service on the United States Attorney and Attorney General was proper. In our opinion the plaintiff had in mind the proper partics to sue but merely mistakenly captioned the defendant as the United States Civil Service Commission. Leave to correct the misnomer will be granted.

II. Motion to Vacate Default Judgment

Defendant has moved to vacate the two default judgment orders on the ground that the default judgments were not entered in accordance with Rule 55(e) of the Federal Rules of Civil Procedure because the Court did not have subject matter jurisdiction over the action. Defendant's assertion is based on three arguments: (1) there was no proper party defendant before the Court, (2) plaintiff failed to exhaust her administrative remedies, and (3) a three-judge court was necessary to enjoin 5 U.S.C. § 3841 (a)(4)(A)(ii).

At the outset it should be pointed out that defendant is relying on the wrong section of the Federal Rules of Civil Procedure for relief. When a default judgment has been entered, Rule 55(c) directs that

it may be set aside only in accordance with Rule 60(b). Rule 60(b) provides that relief from a final judgment may be granted for:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

The principal basis for an attack on a default judgment under Rule 60(b)(4) asserts that it is void for lack of jurisdiction. 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE; CIVIL § 2695 at 325 (1973). Thus, defendant's contention that the Court lacked subject matter jurisdiction does not fall within Rule 55(e) but rather under Rule 60(b)(4). Under Rule 60(b)(4) there is no question of discretion on the part of the court or any requirement, as there usually is when default judgments are attacked under Rule 60(b), that the moving party demonstrate that he has a meritorious defense. The judgment is either void or it is valid. 11 C. WRIGHT & A. MILLER, *supra* § 2682 at 197 (1973); 3 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 1327 at 412 (Wright ed. 1958).

A. Lack of Proper Party Defendant

Defendant's first argument for why the Court lacked subject matter jurisdiction is that there was not a proper party defendant before the Court since the United States Civil Service Commission is not a suable entity. As pointed out in an earlier portion of this Order, this Court believes this matter to be a mere misnomer of the defendant which was nonprejudicial since no one was misled and service was proper. As this Court has granted plaintiff's motion to correct the misnomer, defendant's argument that there was not a proper party defendant before the Court is moot.

B. Exhaustion of Administrative Remedies

Defendant's second argument is that the plaintiff failed to exhaust her administrative remedies because she failed to appeal the decision denying her benefits to the Board of Appeals and Review.

Although it is often stated that judicial relief must be denied until administrative remedies have been exhausted, even a cursory examination of the applicable cases shows that exhaustion is sometimes required and sometimes not. While agencies do not have the authority to take action which runs counter to the expressed language of a statute, *Public Utilities Comm.* v. *United States*, 335 U.S. 534, 539 (1958), the Supreme Court will sometimes require exhaustion

before a challenge can be made in a reviewing court of the constitutionality of a statute. As Professor Davis has stated, however, no clear principle emerges from the Supreme Court's conflicting decisions as to when exhaustion should be required when challenging the constitutionality of a statute. K. Davis, ADMINISTRATIVE LAW TEXT § 20.10 at 394 (3d ed. 1972).

Nevertheless, courts often cite as a reason for requiring exhaustion in such a case the facts that "important and difficult constitutional issues would be decided devoid of factual context and before it was clear that appellants were covered by the Act." *W.E.B. DuBois Clubs of America* v. *Clark*, 389 U.S. 309, 312 (1967). This *DuBois* doctrine was recently applied by the United States Court of Appeals for the Sixth Circuit in *Robinson* v. *Dow*, No. 75-1026 (6th Cir., July 23, 1975). In *Robinson*, the Court held that exhaustion was required even though the constitutionality of a statute was challenged because the issues involved determinations of factual questions.

In the present case, however, there is no factual dispute between the parties. In fact, defendant conceded all factual issues in plaintiff's favor in open court. HEARING ON MOTION FOR JUDGMENT BY DEFAULT, p. 3, September 12, 1973. Therefore, since the United States Civil Service Commission has no authority to declare an Act of Congress unconstitutional and there was no possibility of further development of the factual context, there was no purpose to

be served by appealing to the Board of Appeals and Review. Accordingly, this Court holds that the exhaustion doctrine is inapplicable.

C. Necessity for a Three-Judge Court

Defendant's third argument for why the Court lacked subject matter jurisdiction is that a three-judge court is necessary to enjoin the operation of a statute on the ground that it is unconstitutional. In essence, defendant's contention is that the rule announced in *Bailey* v. *Patterson*, 369 U.S. 31, 33 (1962) that three judges are not required when "prior decisions make frivolous any claim that a state statute on its face is not unconstitutional" is not applicable to this case because prior decisions do not render frivolous the assertion that the statute is constitutional on its face.

We cannot agree. This area has been extensively litigated. The holding of *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 176 (1972) that the Equal Protection Clause is violated by discriminatory laws relating to the status of birth where the classification is justified by no legitimate state interest was recently reaffirmed by the Supreme Court in *Jimenez* v. *Weinberger*, 417 U.S. 628, 632 (1974). This Court therefore sees no reason to change its earlier determination embodied in its Order and Opinion of September 18, 1973 that an injunction against 5 U.S.C. § 8341(a)(4)(A)(ii) should issue without the necessity of convening a three-judge court.

In addition, the Court's second Order of September 18, 1973 which held that plaintiff was entitled to benefits could also be made without the necessity of a three-judge court. *Fleming* v. *Nestor*, 363 U.S. 603, 607 (1960).

It is the conclusion of this Court that the default judgments entered on September 18, 1973 were valid under Rule 60(b)(4) and that defendant's motion to vacate should be denied.

In this case the United States, be it through a suable or non-suable agency or commission, or be it through suable or non-suable members of the commission,[1] has defaulted fully and basically before not one, but *two* Federal Courts. That is *one too many*. It is *accented* by the fact that one of the Federal Courts is an appellate court.

/s/ Timothy S. Hogan
United States District Judge

[1] In any event, with the full knowledge of the United States lawyers representing whoever should have been sued.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil Action No. 8682

[Filed Nov. 20, 11.44 a.m., '75]

INFANT JOAN MYERS, through her mother and next friend Evelyn M. Myers, PLAINTIFF

—*v.*—

ROBERT HAMPTON, JAYNE P. SPAIN, L. J. ANDOLSEK, Commissioners of the United States Civil Service Commission, DEFENDANTS

FINAL JUDGMENT

This judgment shall constitute the final judgment in this cause in conformity with the requirements of Rule 58 of the Federal Rules of Civil Procedure. For the reasons stated in the Court's (1) Order of September 18, 1973, (2) Opinion and Order of September 18, 1973, and (3) Order Granting Plaintiff's Motion for Leave to Correct Misnomer and Denying Defendants' Motion to Vacate Default Judgment of August 15, 1975, the relief requested by the plaintiff in this cause is granted with the following clarification and limitations:

1. The proper parties defendant in this cause are the individual Commissioners of the United States Civil Service Commission. As a result, the description of the defendants in all prior pleadings and orders

in this action is retroactively changed to reflect that Robert Hampton, Jayne B. Spain and L. J. Andolsek, Commissioners of the United States Civil Service Commission, are the proper parties defendant. Correspondingly, the United States Civil Service Commission is dismissed as a party defendant in this action and its name is to be striken from all prior pleadings and orders in this cause. The reasons for these changes are found in this Court's August 15, 1975, Order Granting Plaintiff's Motion for Leave to Correct Misnomer and Denying Defendant's Motion to Vacate Default Judgment.

2. This Court's Opinion and Order of September 18, 1973, enjoined the United States Civil Service Commission from treating illegitimate children seeking survivor's benefits under 5 U.S.C. 8341(a)(4)(A)(ii) differently from legitimate children seeking such benefits. As the plaintiff has indicated that she no longer desires to pursue the class action and injunction aspects of this case, the injunction granted in this Court's Opinion and Order of September 18, 1973, is dissolved and the defendants are no longer enjoined from the further enforcement, operation or execution of 5 U.S.C. 8341(a)(4)(A)(ii) with respect to other Civil Service annuity beneficiaries. The defendants however are ordered to pay the plaintiff in this cause Civil Service annuity benefits commencing from March 7, 1966, the day following the death of the plaintiff's father. The payment of such benefits is consistent with 5 U.S.C. 8345(b) which states that Civil Service annuity benefits are to commence on the

day after the occurance of the event on which payment thereof is based and the plaintiff's prayer for relief in its Amended Complaint of May 18, 1973.

/s/ Timothy S. Hogan
United States District Judge

Approved as to form:

/s/ Michael J. Mooney
MICHAEL J. MOONEY
Attorney for Plaintiff

/s/ Gerald F. Kaminski
GERALD F. KAMINSKI
Attorney for Defendants

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil Action No. 8682

[Filed Dec. 17, 1975]

INFANT JOAN MYERS, through her mother and next friend Evelyn M. Myers, PLAINTIFF

—*v.*—

ROBERT HAMPTON, JAYNE P. SPAIN, L. J. ANDOLSEK, Commissioners of the United States Civil Service Commission, DEFENDANTS

DEFENDANTS' NOTICE OF APPEAL TO UNITED STATES SUPREME COURT

Robert Hampton, Jayne P. Spain and L. J. Andolsek, Commissioners of the United States Civil Service Commission, defendants herein, hereby appeal from this Court's Final Judgment of November 20, 1975, in this cause to the United States Supreme Court pursuant to 28 U.S.C. 1252 and 2101.

Respectfully submitted,

WILLIAM W. MILLIGAN
United States Attorney

/s/ Gerald F. Kaminski
GERALD F. KAMINSKI
Assistant U. S. Attorney

APPENDIX E

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of * * * property, without due process of law * * *.

5 U.S.C. 8341(a)(3) provides:

> (3) "child" means—
>
> (A) an unmarried child under 18 years of age, including (i) an adopted child, and (ii) a stepchild or recognized natural child who lived with the employee or Member in a regular parent-child relationship;
>
> (B) such unmarried child regardless of age who is incapable of self-support because of mental or physical disability incurred before age 18; or
>
> (C) such unmarried child between 18 and 22 years of age who is a student regularly pursuing a full-time course of study or training in residence in a high school, trade school, technical or vocational institute, junior college, college, university, or comparable recognized educational institution.

Federal Personnel Manual, chapter 831-1, subchapter S17-2 provides:

> a. *Conditions to be met by employee.* To qualify his widow (or her widower) or children, or both, for a survivor annuity, an employee must have:
>
> (1) Completed at least 18 months' civilian service; and

(2) Died while employed in a position subject to the retirement system.

b. *Conditions to be met by widow or widower.* To qualify for a survivor annuity, an employee's widow or widower must:

(1) Have been married to the employee for at least two years immediately preceding the employee's death; or

(2) Be the parent of a child born of the marriage with the employee.

c. *Conditions to be met by child.*[1] To qualify for a survivor annuity, the child (including a legally adopted one) of an employee must:

(1) Be under age 18; *and*

(2) Be unmarried.

d. *Child incapable of self-support.* A child who is over age 18 may be entitled to a survivor annuity if he meets the other requirements in paragraph c above and, in addition, is incapable of self-support by reason of a mental or physical disability which was incurred before he reached age 18. To determine whether he meets this disability requirement, a child must undergo a physical examination which is arranged by the Civil Service Commission without cost to the family.

e. *Stepchildren and illegitimate children.* A stepchild or an acknowledged illegitimate child may be entitled to a survivor annuity if he

[1] Where under State law a child may not inherit from his natural parent after being adopted by another person, the survivor annuity may not be paid the child upon death of the natural parent.

meets the requirements in paragraph c above and, in addition, had lived with the employee in a regular parent-child relationship.

f. *Student children aged 18 to 22.*[2] An unmarried child (including a stepchild or an illegitimate child who had lived with the employee in a regular parent-child relationship) over age 18 may be entitled to a survivor annuity if he is a student regularly pursuing a full-time course of resident study or training in a high school, trade school, technical or vocational institute, junior college, college, university, or comparable recognized educational institution. A full-time course of resident study or training means a day or evening noncorrespondence course which includes school attendance at the rate of at least 36 weeks per academic year with a subject load sufficient, if successfully completed, to attain the educational or training objective within the period generally accepted as minimum for completion, by a full-time day student, of the academic or training program concerned.

[2] For this purpose a student child whose birthday falls during the school year (September 1-June 30) is considered not to reach age 22 until July 1 following his actual 22d birthday.

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